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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re C.F., a Person Coming Under the
Juvenile Court Law.

T.F.,

Petitioner,

v.

THE SUPERIOR COURT OF CONTRA
COSTA COUNTY,

Respondent,

CONTRA COSTA COUNTY
CHILDREN & FAMILY SERVICES
BUREAU,

Real Party in Interest.

A156520

(Contra Costa County
Super. Ct. No. J18-00392)

T.F. (Mother) seeks extraordinary writ relief (rule¹ 8.452) from the juvenile court's order issued at a contested six-month review hearing terminating her reunification services and setting a section 366.26 permanency planning hearing regarding her son, C.F. Mother contends that the juvenile court erred in finding that she failed to participate and make substantive progress in her court-ordered services. She further maintains that she was not provided with reasonable reunification services and that the court erred in

¹ All rule references are to the California Rules of Court. All statutory references are to the Welfare and Institutions Code unless otherwise specified.

refusing to grant her additional reunification services. Upon review, we find that substantial evidence supports the juvenile court's order setting a section 366.26 hearing. We therefore deny the petition.

BACKGROUND

Mother has a history of mental illness and substance abuse. C.F. (born in March 2018) was detained by the Contra Costa County and Family Services Bureau (Bureau) in April 2018, after the Bureau received a referral that Mother absconded from a residential drug-treatment facility in San Francisco with 20-day-old C.F. According to the social worker's report, Mother left the facility without permission on March 30, 2018. Facility staff members found C.F.'s clothing and birth certificate in a trash can. The staff members were concerned by Mother's sudden departure and called the police because they were aware of her schizoaffective disorder and history of methamphetamine use, as well as the fact that she needed to be reminded to feed C.F. and attend to his needs.

Eventually, police located Mother and C.F. at a motel in Concord. Mother was arrested on two outstanding warrants. C.F. was placed with his maternal grandmother, Pamela H., who was also the legal guardian of Mother's one-year-old son, L.F. Pamela reported that Mother has had a history of mental-health problems since she was approximately 16 years old. Pamela further reported that Mother struggled with violent behavior and substance abuse but noted that when she took her medication and did not abuse drugs, Mother did a good job of taking care of C.F.

Even before C.F.'s detention in April 2018, the Bureau was aware of Mother's history of mental illness and substance abuse from dependency proceedings involving Mother's older child, L.F. The Bureau's records revealed that Mother had been psychiatrically hospitalized in December 2016 due to having active hallucinations after L.F. was born. During her pregnancy with L.F., Mother twice tested positive for drugs. Mother was described as being "actively psychotic" following L.F.'s birth. Mother's parental rights were terminated in March 2018, and Pamela was named L.F.'s legal guardian.

The detention report further revealed that Mother had an extensive criminal history, with numerous arrests spanning more than a decade, including for assault, battery, forgery, fraud, burglary, theft, prostitution, and disorderly conduct. Mother had six felony convictions and one misdemeanor conviction. At the time of the detention hearing, Mother had pled guilty to but had not yet been sentenced on charges of assault with a deadly weapon (not firearm) and vehicle theft. The juvenile court ordered that C.F. be detained and placed in Pamela's home.

At the contested jurisdictional hearing on May 24, 2018, the Bureau requested that the juvenile court take judicial notice of the dependency orders and findings in C.F.'s sibling's case. The juvenile court sustained the Bureau's petition, which alleged that C.F. was at risk of harm because Mother had mental-health issues and a substance-abuse problem; Mother was non-compliant with her prescribed psychotropic medication; and Mother had failed to reunify with C.F.'s sibling, L.F., leading to the termination of her parental rights. The court concluded C.F. was a person described by subdivisions (b) [failure to protect] and (j) [abuse/neglect of a sibling] of section 300. The court then set the matter for a disposition hearing.

The Bureau's disposition report disclosed that Mother had bi-polar depression and schizoaffective disorder. Mother had a treating psychiatrist and therapist. Mother received Haldol injections every three weeks. The report indicated that Mother began using marijuana at age 14 and methamphetamine at age 28. At the time of the disposition hearing, Mother was 31 years old. Mother stated that she had been clean and sober for the past year. She denied current drug use but had missed four of the six tests that the Bureau had set up for her.

The disposition report revealed that Mother had attended a parenting education class when she lived in San Francisco and was currently attending parenting classes in Contra Costa County, which she was about to complete. Based on the visitation monitor's observations, Mother was able to feed C.F., change his diaper, and interact with him. However, when C.F. cried, Mother became anxious and sought assistance

from her own mother (Pamela) to soothe the baby. The Bureau recommended that family reunification services be provided to Mother.

At the scheduled disposition hearing on July 5, 2018, Mother submitted to a drug test, which came back negative. The matter was continued to July 26, 2018 for a contested disposition hearing. In a report prepared for the contested hearing, the Bureau reported that Mother's probation officer had been close to revoking Mother's probation because she regularly missed scheduled appointments and had not submitted to drug testing. Mother had, however, successfully completed her parenting class and provided medical records establishing that she was in compliance with her medication regimen.

The contested disposition hearing was continued to August 16, 2018, at which time the juvenile court adopted the Bureau's recommendations and ordered family reunification services for Mother with a plan that required Mother to engage in individual therapy and follow the recommendations of the therapist; cooperate with her treating psychiatrist and follow all recommendations regarding medication; complete a parenting education class; successfully complete an inpatient substance-abuse treatment program; and participate in random drug testing for six months, with all negative tests during that period. The plan noted that a "[n]o show for a test will be considered positive."

The Bureau's six-month review report disclosed that Mother had been actively engaged in her case plan, including not breaking the law, obtaining and maintaining stable housing, having a legal source of income, complying with medical and psychological treatment, maintaining a psychotropic-medication regimen, and completing an inpatient substance-abuse program. The Bureau noted the importance of monitoring Mother's transition from the highly structured environment of her inpatient program to one with limited structure. Two areas of concern were Mother's compliance with the required drug testing and her parenting abilities. Specifically, although all of her drug tests were negative, Mother had completed only 13 of the required 22 drug tests.² Mother regularly visited C.F., but she continued to struggle in her ability to care for him when he

² Mother did not show for testing on eight occasions, and one test was cancelled when a sample leaked in transit.

cried. For instance, Mother asked to end two of her visits early when C.F. began to cry and she could not soothe him. The social worker expressed concern about Mother's inability or unwillingness to attempt to comfort her baby when he cried. The Bureau determined that Mother's progress in alleviating or mitigating the causes necessitating removal was inadequate. However, the Bureau recommended that reunification services be continued to the 12-month mark.

At the six-month review hearing on December 20, 2018, C.F.'s counsel opposed the Bureau's recommendation to continue services. The juvenile court indicated it was "very concerned" about Mother's numerous missed drug tests, which it considered the equivalent of positive results. The juvenile court was also troubled by Mother's inability to take care of her baby when he cried. The matter was continued for a contested hearing.

In preparation for the contested hearing, the Bureau prepared a memorandum to update the juvenile court about Mother's visitation and drug testing between December 20, 2018 and January 10, 2019. The social worker reported that Mother missed three consecutive visits with C.F. on December 17, 24, and 31. However, Mother did have one supervised visit on January 7, 2019. The social worker supervising the visit indicated that Mother acted appropriately but believed Mother would benefit from another parenting class. Mother reported that she missed the December visits because she was "really busy" signing up for outpatient treatment and community college classes. Mother enrolled in outpatient treatment on December 27, 2018. Mother's probation officer advised the social worker that Mother missed a drug test on December 31, 2018; Mother had submitted to a drug test on January 9, 2019, but the results of that test had not yet been reported. Despite these difficulties, the Bureau continued to recommend that Mother receive an additional six months of services.

At the contested hearing on January 10, 2019, the court reiterated its concern regarding Mother's progress. County Counsel requested a continuance to discuss the necessary recommendations that had been omitted. The court continued the matter until January 31, 2019.

In preparation for the January 31, 2019 hearing, the Bureau prepared a memorandum to advise the juvenile court that it was changing its recommendation from continued services to termination of services and permanency planning. Mother had missed court-ordered drug tests on November 6, 10, and 13, as well as a test for probation on December 31, the same day she missed a visit with her son. Since May 2018, Mother tested negative 16 times but failed to appear for testing on 20 occasions. These missed tests, the three recent and consecutive missed visits, and C.F.'s young age caused the Bureau to recommend that services be terminated and a section 366.26 hearing be set.

At the January 31, 2019 hearing, the social worker testified that Mother had completed her residential treatment program, which required her to drug test as part of her attendance. She noted that when Mother did submit to the Bureau's drug testing, her tests had all been negative. The social worker also testified that Mother was compliant with the requirements of her mental-health treatment, including taking her medication as prescribed. The social worker believed that Mother was compliant with the terms of her probation, except for missing a drug test on December 31, 2018.

As for Mother's visitation with C.F., the social worker testified that she missed three visits in a row, with a total of seven missed visits. Mother also asked to shorten visits when C.F. was tired or fussy. As late as December 11, 2018, Mother was still unwilling or unable to care for C.F. when he cried. At that visit, Mother said, "Can we end sooner, and give him back to my mom [Pamela] because he's fussing?"

Mother's attorney argued that she had made significant progress in her case plan by completing a residential treatment program, obtaining suitable housing, completing a parenting class, and complying with her mental-health treatment. Counsel argued that Mother's substance-abuse and mental-health issues made it difficult for her to comply with her case plan within the allotted time. Counsel therefore requested additional time for Mother to complete her case plan.

The juvenile court commended the social worker for "ben[ding] over backwards" to provide services to Mother, noting that the Bureau had done all it could to help Mother. As for Mother's compliance with her case plan, the court noted that Mother had

missed 20 drug tests. While Mother had made some progress in other areas of her case plan, the court determined she had not made progress when it came to her child's needs. C.F. was not a priority for Mother, as demonstrated by the fact she missed three recent visits because she was "busy." The court was very concerned by Mother's continued inability to cope with the normal crying associated with babies C.F.'s age. Instead of figuring out how to soothe her son when he cried, Mother cut her visits short.

The juvenile court determined that Mother had not regularly participated in her case plan and had not made substantive progress, and that it was therefore in the child's best interest to terminate services, as it would be detrimental to C.F. to continue such services. The court could not "find in any way" that there was a substantial probability that C.F. could be returned to Mother within the remaining time allotted. The court terminated Mother's services and set a hearing pursuant to section 366.26.

Mother subsequently filed a timely notice of her intent to file a writ petition and filed her petition on March 12, 2019.

DISCUSSION

Mother first argues in her writ petition that the trial court erred in finding that she failed to regularly participate in and make substantive progress in her court-ordered services. Specifically, she cites evidence that she tested negative for drugs, completed a residential drug-treatment program and a parenting class, enrolled in an outpatient drug-treatment program, was medically compliant and attending therapy, obtained suitable housing, and regularly met with the social worker. She acknowledges that she failed to comply with approximately half the drug tests but adds that when she did test, she always tested negative. As to her missed visits with C.F., she maintains there was no detriment to the child because he was not brought to the visitation site when she failed to confirm the visits 24 hours in advance. Further, because the court's order was in error, she argues, its decision not to continue services was also in error. We disagree.

At the six-month review hearing, the court must return the child to parental custody unless the court finds, by a preponderance of the evidence, that return of the child would create a substantial risk of detriment to the child's safety, protection, or

physical or emotional well-being. (§ 366.21, subd. (e)(1).) Failure to participate regularly and make substantive progress in court-ordered treatment programs is prima facie evidence that return of the child would be detrimental. (*Ibid.*) Further, the court may terminate reunification services and schedule a permanency planning hearing where, as here, the child was under the age of three years on the date of removal and the court finds by clear and convincing evidence that the parent failed to regularly participate and make substantive progress in the court-ordered treatment plan. (§ 366.21, subd. (e)(3).) If, however, the court finds there is a substantial probability that the child may be returned to his parent within six months or that reasonable services have not been provided, the court must continue the case to the 12-month permanency hearing. (*Ibid.*)

We review the juvenile court's detriment finding under section 366.21, subdivision (e)(1) for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763.) This means, among other things, that we must uphold the decision of the juvenile court even if substantial evidence might also support a different conclusion. (*In re Charlotte V.* (2016) 6 Cal.App.5th 51, 57 [under substantial evidence analysis “ ‘[m]ere support for a contrary conclusion is not enough to defeat the finding’ ”].) The decision to terminate services under section 366.21, subdivision (e)(3) is reviewed for substantial evidence, bearing in mind the clear and convincing evidence standard. (See, *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1238 (*T.J.*).)

In this case, Mother was ordered, as part of her reunification plan, to participate in random drug testing. Mother missed more than half the mandatory drug tests. Her decision not to submit to the required drug testing can reasonably be viewed as a failure to regularly participate in and make substantive progress in her court-ordered services. Moreover, it is not as though Mother's substance abuse was a minor aspect of her overall plan for reunification. On the contrary, because her drug abuse was a major contributing factor in her failure to protect C.F., ensuring that Mother was consistently drug-free was a key component of her case plan. While it is true that when Mother did submit to testing her tests were negative, the fact remains that she missed more than half the required tests,

which were presumed to be positive. By refusing to participate in consistent drug testing, Mother posed a continuing risk of harm to C.F.

In addition to her failure to comply with the requisite drug testing, Mother missed seven visits with C.F., including three consecutive visits while the contested six-month review hearing was pending, and ended at least two visits early when C.F. became fussy. While Mother was in compliance with several aspects of her case plan, consistent visitation and appropriate parenting of C.J. were critically important components of the reunification plan. Moreover, “simply complying with the reunification plan . . . is not determinative. The court must also consider the parents’ progress and capacity to meet the objectives of the plan; otherwise the reasons for removing the children out-of-home will not have been ameliorated.” (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1143.) Here, Mother’s missed visits and inability to appropriately respond C.F. when he cried or became fussy, even after participating in parenting classes, demonstrates her lack of capacity to appropriately care for her young son.

Consequently, substantial evidence supports the juvenile court’s finding that it would be detrimental to return C.F. to her custody. The same reasoning supports the juvenile court’s finding that C.F. could not be returned to Mother’s care in the remaining time allotted. The trial court’s order terminating services is supported by substantial evidence, as the evidence of Mother’s repeated failure to comply with random drug testing, coupled with her demonstrated inability to appropriately care for C.F., leaves no substantial doubt that Mother failed to regularly participate and make substantive progress in the court-ordered treatment plan. (§ 366.21, subd. (e)(3); *T.J.*, *supra*, 21 Cal.App.5th at p. 1238.)

Mother’s additional claim that she was not provided reasonable services is forfeited because it was not raised in the juvenile court. (See *In re T.G.* (2015) 242 Cal.App.4th 976, 984.) Indeed, the entire focus of the contested six-month review hearing was on Mother’s efforts and whether she should receive another six months of services. “[A]lthough an appellate court has the discretion to excuse such forfeiture, it should do so ‘rarely and only in cases presenting an important legal issue.’ [Citation.]

This is especially true in juvenile dependency cases, which involve the well-being of children and in which ‘considerations such as permanency and stability are of paramount importance.’ ” (*Ibid.*; see also *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [forfeiture rule exists “to encourage parties to bring errors to the attention of the trial court, so that they may be corrected”].) We see no reason to excuse Mother’s forfeiture under the circumstances of this case.

DISPOSITION

The petition is denied on the merits. (See § 366.26, subd. (l)(1)(C), (4)(B).) Because the permanency planning hearing in this matter is set for May 9, 2019, this opinion is final as to this court immediately. (Rules 8.452(i), 8.490(b)(2)(A).) Mother’s request for a stay is denied as moot.

BROWN, J.

WE CONCUR:

STREETER, ACTING P. J.

TUCHER, J.

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